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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

JON D. BUI, on behalf of himself
and all others similarly situated,

Plaintiff,

v.

SEARS, ROEBUCK, & CO.,
SEARS HOLDING CORP., and
KCD IP, LLC

Defendant.

Case No. 5:18-cv-4121

DEMAND FOR JURY TRIAL

CLASS ACTION COMPLAINT

Plaintiff Jon D. Bui (“Plaintiff”), individually and on behalf of all others similarly-situated, brings this action against Sears Holdings Corporation, KCD IP, LLC, and Sears, Roebuck and Company (collectively “Sears”). Plaintiffs’ allegations are based upon personal knowledge as to their own conduct and on information and belief as to the acts of others.

NATURE OF THE CASE

1. Sears designs, manufactures, sells, and markets a wide range of home products. One of its key proprietary brands is Kenmore, which sears refers to as “among the most trusted and preferred brands in the U.S.” *See* www.searsholdings.com/about/sears.

2. Despite Sears’ claim that its Kenmore products are among the most trusted in the United States, Sears designed, manufactured, marketed, and sold water heaters that have a material and serious defect. Specifically, gas water heaters outfitted with Honeywell WV8840 gas valves manufactured from 2010 to 2012 (“Class Water Heaters”) leak due to erosion of the gas valve’s plastic sensors. The plastic temperature sensors erode or otherwise deteriorate such that a pin-sized hole (or holes) form in the sensors. As a result, water leaks from an affected water heater’s sensor to the surrounding premises. The water flow will not stop until the water

1 supply is shut off, the water is drained from the water heater, and the sensor is
2 replaced (hereinafter, “The Defect”).

3 3. As a result of the Defect, which was present at the time the point of
4 sale, flooding incidents have caused damage to consumers’ water heaters, as well as
5 causing water damage to homes. Although these incidents have been reported to
6 Sears, the company did not forewarn consumers, recall the water heaters, or
7 otherwise notify customers about the Defect.
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10 4. These water heaters should never have been placed in the stream of
11 commerce. Sears’ conduct violates the laws of California. On behalf of himself and
12 the proposed Class, Plaintiff seeks to compel Sears to warn consumers about the
13 Defect, to bear the expense of replacing the defective water heaters that have not yet
14 failed, and to pay for property damage that has already resulted from the Defect,
15 including but not limited to flooding. Additionally, Plaintiff seeks statutory and
16 compensatory damages, injunctive and declaratory relief, restitution, disgorgement
17 of profits, attorneys’ fees and costs, and the repair or replacement of the water
18 heaters.
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22 **PARTIES**

23 5. Plaintiff Jon D. Bui is a citizen and resident of Monterey
24 County, California.
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1 6. Defendant Sears Holdings Corporation is a Delaware corporation with
2 its principal place of business at 3333 Beverly Road, Hoffman Estates, Illinois
3 60179. Sears Holdings Corporation is the parent company for Sears and Kmart, as
4 well as other national retailers. Sears Holdings Corporation markets, sells, and
5 services Kenmore appliances and equipment, including the Lawnmowers, through
6 its retail establishments throughout the United States. Its stock is traded on
7 NASDAQ as "SHLD." Sears Holdings Corporation was engaged in the business of
8 designing, manufacturing, and distributing the water heaters for sale to consumers
9 in this jurisdiction and others. Sears Holdings Corporation engages in a continuous
10 course of business in California, and based upon information and belief, sells
11 thousands of water heaters in this District every year. California has a significant
12 relationship to the allegations and events alleged herein.
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17 7. Defendant KCD IP, LLC is a Delaware limited liability company with
18 its principal place of business at 3333 Beverly Road, Hoffman Estates, Illinois
19 60179. It is a special purpose entity created by Sears Holdings for securitization
20 purposes that owns Sears' house brands, including Kenmore, Craftsman, and
21 Diehard.
22

23 8. Defendant Sears, Roebuck and Company is a wholly-owned subsidiary
24 of Sears Holdings Corporation, with its principal place of business at 3333 Beverly
25 Road, Hoffman Estates, Illinois 60179. Sears, Roebuck and Company offers its
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1 products and services through more than 1,320 Sears-branded and affiliated stores
2 in the United States and Canada, including more than 790 full-line and more than 50
3 specialty stores in the United States. Sears, Roebuck and Company offers consumers
4 leading proprietary brands, including Kenmore.
5

6 **JURISDICTION AND VENUE**

7 9. This Court has jurisdiction over this action under the Class Action
8 Fairness Act, 28 U.S.C. § 1332(d). There are at least 100 members in the proposed
9 class, the aggregate claims of the individual class members exceed the sum of
10 \$5,000,000, exclusive of interests and costs, and this is a class action in which Sears
11 and more than two-thirds of the proposed plaintiff class are citizens of different
12 states.
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15 10. This Court may exercise jurisdiction over Sears because they do
16 substantial business in this State and within this District, receive substantial
17 compensation and profits from the marketing, distribution, sales and servicing of
18 water heaters in this District, and have engaged in the unlawful practices described
19 in this Complaint in this District, so as to subject himself to personal jurisdiction in
20 this District, thus rendering the exercise of jurisdiction by this Court proper and
21 necessary.
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25 11. Venue is proper in this district under 28 U.S.C. § 1391 because Plaintiff
26 Bui resides in this District and also purchased a Class Water Heater in this District;
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1 the Sears defendants are foreign entities; and a substantial part of the events or
2 omissions giving rise to Plaintiff's claims occurred in this District.

3 **SUBSTANTIVE ALLEGATIONS**

4 **The Gas Valve Defect**

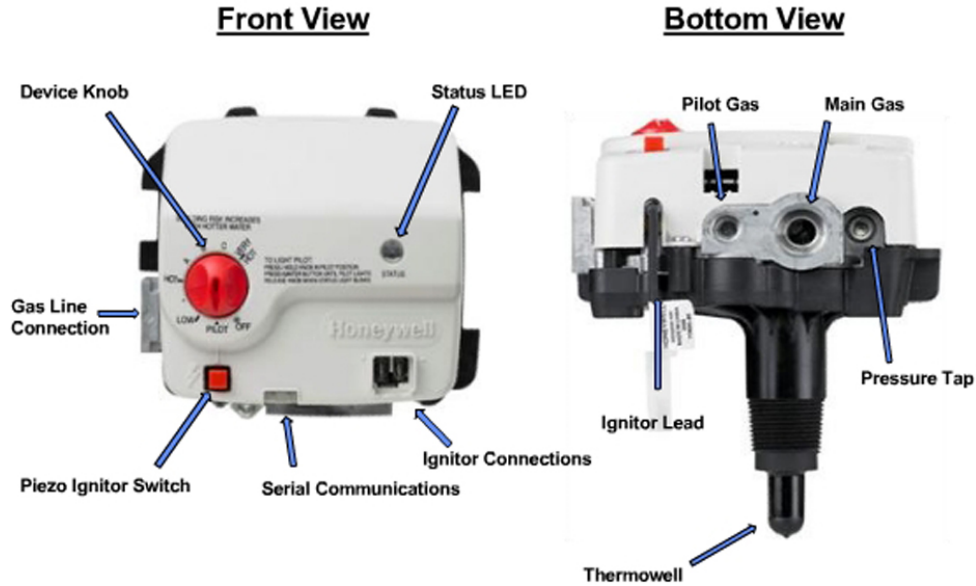
5 12. Every gas water heater has a gas valve control that is mounted outside
6 of the water heater tank that controls the pilot light for the gas supply and regulates
7 the water temperature within the water heater. Sears is one of the leading
8 manufacturers of gas valves for water heaters ("Honeywell Gas Valve" or "Gas
9 Valve").
10
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12 13. The Gas Valve contains a "thermowell" which is a tubular fitting used
13 to protect the Gas Valve's temperature sensors. A temperature sensor is inserted in
14 the open end of the thermowell tube.
15

16 14. The thermowell located in the Gas Valves is made of a polymeric
17 plastic material, as shown below in the "Bottom View" diagram.
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WV8840 Product Overview

Honeywell



15. The Gas Valve control comes pre-installed on Kenmore water heaters and several additional brands of water heaters, including but not limited to: Bradford White, American Water Heater, Proline, Whirlpool, U.S. Craftsman, Rheem and A.O. Smith.

16. While the Defect was present at the point of sale, it was unknown to consumers prior to the manifestation of the Defect in their own hot water heaters. However, Sears knew or should have known that the Gas Valves contained the Defect. Specifically, the temperature sensor located inside the water heater contains a defect that allows a pin-sized hole (or holes) to form. As a result, water leaks from water heater and floods the surrounding area.

17. Defective Gas Valves utilize polymeric plastic on the tip of the threaded back plate. As the polymeric plastic is exposed to water, it deteriorates, decreases in thickness, becomes brittle, and eventually erodes to the point of water leaking from the water heater. The photographs below show a Gas Valve after the Defect has manifested.





18. Eventually, the fractured plastic polymer allows water under pressure to flow into the gas control area, causing leakage, damage to the water heater, and flooding of consumer's homes and personal property.

19. Sears knew or should have known that the Gas Valve is defective and would be prone to fracture and leakage.

20. Significantly, Sears utilizes Honeywell gas valves in which metal is substituted for the defective polymeric plastic. The metal tipped gas valves do not experience the severe deterioration and/or leakage seen in the plastic Class Water Heaters. For example, while 2010 through 2012 "WV Model" Honeywell Gas Valves utilized a polymeric material on the tip, the more recent "WT Model" Honeywell Gas Valve is manufactured with a metal tip.



Pictured: A side-by-side comparison of the Sears WT Model Gas Valve (left) and the WV Model Gas Valve (right).



WT Model valve on the left. WV Model valve on the right.

SEARS' NEGLIGENT AND INTENTIONAL CONDUCT

21. Sears failed to adequately design, manufacture, and/or test Class Water Heaters to ensure they were free from the Defect before offering them for sale to Plaintiff and the Class, despite its duty to do so.

22. The Defect poses a serious and immediate safety risk to consumers and the public and has caused or will cause Plaintiff's and Class Members' Class Water Heaters to fail during their expected useful lives.

23. Sears' Class Gas Valve should have been usable for its intended purpose during its expected useful life of 6-10 years¹. The Defect, however, existed at the time that Class Water Heaters were sold to Plaintiff and the Class, and the Defect immediately rendered the Class Water Heaters unfit for the ordinary and intended purpose for which they are marketed and sold.

24. If Class Water Heaters did not suffer from the Defect, Plaintiff and the Class would not have suffered the damages set forth in this Complaint.

25. Sears has a duty to protect consumers by warning them that the Defect poses unreasonable risks of personal injury and/or property damage.

26. Nonetheless, even though Sears knew or should have known of the Defect, they chose to conceal the existence of the Defect, continued to sell Class Water Heaters, and failed to remove Class Water Heaters from the marketplace.

¹ <https://www.nachi.org/life-expectancy.htm>

1 Sears took these actions to realize the substantial financial benefits of selling the
2 defective Class Water Heaters to the unsuspecting public.

3 27. Sears knew or should have known that consumers including Plaintiff
4 and the Class: (a) were unaware of the Defect and could not reasonably be expected
5 to discover the Defect until their Class Water Heaters failed; (b) expected to use
6 Class Water Heaters in their homes without putting their safety and property at risk;
7 and (c) expected Sears to disclose any Defect that would prevent Class Water
8 Heaters from safely performing their intended purpose, as such disclosure by Sears
9 would impact a reasonable consumer's decision whether to purchase a water heater
10 with the Class Water Heaters.
11

12 28. As a result of Sears' concealment of the Defect, many Class Members
13 remain unaware of the existence of the Defect and that the Class Gas Valve poses
14 an unreasonable safety risk and risk of property damage during normal use.
15

16 29. Had Plaintiff and Class Members been made aware of the Defect, they
17 would not have purchased Class Water Heaters.
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21 **SEARS' KNOWLEDGE OF THE DEFECT**

22 30. Sears knew or should have known when it sold the Class Water Heaters
23 that these Gas Valves contained the Defect, that the Gas Valves would not hold up
24 to continuous exposure to hot water, and that as a result of the Defect, the Class Gas
25

1 Valve could leak causing damage to the unit, consumers' homes, and personal
2 property.

3 31. Sears' knowledge of the Defect is evident from its decision to equip
4 Kenmore water heaters with thermowells manufactured from metal rather than
5 polymeric plastic to eliminate deterioration and leakage problems as described
6 herein. Despite addressing the deterioration and leaking issues through the
7 implementation of WT Model Gas Valves, Sears did not alert Plaintiff and Class
8 Members that their Class Water Heaters contained the Defect and that these
9 defective Class Water Heaters posed a threat of leaking, flooding, and damage to
10 Plaintiff's and Class Members' real and personal property.
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13

14 32. Despite knowing that its Gas Valves were likely to deteriorate and leak
15 as a result of continuous exposure to hot water in their known and intended
16 environment during ordinary operation, Sears continued to sell, distribute, and install
17 Gas Valves that suffered from the Defect.
18

19 33. As discussed above, Sears was aware that their Class Water Heaters
20 contained the Defect and that a change in production materials was necessary to
21 allow the gas valves to function as intended and not fail during normal and intended
22 use. Sears nevertheless decided to manufacture, distribute, and sell Class Water
23 Heaters containing the Defect. Sears thus had exclusive and superior knowledge of
24 the Defect and actively concealed the Defect and corresponding damage from
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1 consumers who had no way to reasonably discover the problem before buying their
2 water heaters.

3 34. Had Plaintiff and Class Members been aware of the Defect, they would
4 not have purchased the Class Water Heaters or would have paid substantially less
5 for them. Plaintiff and Class Members did not receive the benefit of their bargain as
6 a result.
7

8
9 **PLAINTIFF'S EXPERIENCE**

10 35. Plaintiff purchased his 40-gallon Kenmore water heater in March of
11 2013 at Orchard (which has since been acquired by Sears), in Sam City, California,
12 installing it in the garage of his single-family home after reading the User Manual.
13 Plaintiff has extensive experience in construction and has installed numerous water
14 heaters in the course of his profession.
15

16
17 36. Plaintiff never noticed any problem with the water heater. However, in
18 April of 2018, Plaintiff's water heater began leaking, flooding his garage.

19 37. After he discovered the flooding in his garage Plaintiff contacted Sears
20 to repair his Class Water Heater. Sears offered to send out a technician to assess the
21 problem and said that Plaintiff would have to cover the \$160 cost. If the technician
22 determined the unit to be defective, Sears offered to cover the cost of the part, but
23 labor would be paid for by Plaintiff.
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1 38. Thereafter, Plaintiff purchased a replacement Gas Valve from an online
2 retailer for approximately \$400.00. Plaintiff subsequently replaced the defective Gas
3 Valve with the replacement purchased at his expense.
4

5 39. As a result of the Defect and Sears' failure to advise of its existence at
6 the point of sale, Plaintiff has suffered damages and did not receive the benefit of
7 his bargain. Had he been advised of the Defect, Plaintiff either would not have
8 purchased the water heater or would have paid less than he did.
9

10 **CLASS ALLEGATIONS**

11 40. At the time of Plaintiffs' and the Class Members' purchases, Sears
12 failed to disclose the consumer complaints, malfunctions, safety hazards, and
13 material facts related to the Class Water Heaters' Defect.
14

15 41. Before Plaintiffs purchased their Class Water Heaters, Plaintiffs were
16 neither informed about, nor were aware of, the Defect and how it affected Class
17 Water Heaters' components. The Defect was present in the Class Water Heaters at
18 the time they were placed into the stream of commerce.
19

20 42. Sears was in a superior position to know the facts surrounding the
21 Defect in the Class Water Heaters and that it is latent and not easily discoverable.
22 However, instead of disclosing the material Defect to consumers and potential
23 purchasers of the Class Water Heaters, Sears omitted information about it with the
24 intent of selling them to unsuspecting consumers. Sears was under a continuing duty
25 to consumers to disclose the facts that it knew about the Defect's potential safety
26 hazards, regardless the presence of any applicable warranty. Plaintiffs and the Class
27

1 Members relied upon Sears' representations about the safety and functionality of the
2 Class Water Heaters when making their purchasing decisions.

3 43. Sears intentionally concealed the Defect—a material omission—from
4 potential purchasers. Concealment or omission of a material fact in a transaction
5 constitutes fraud, especially when the fact is known to the manufacturer and is not
6 readily ascertainable to consumers despite ordinary diligence and reasonable
7 investigation prior to purchases.
8

9 44. Sears neither discloses the Defect at the point of sale nor later when the
10 problems resulting from the Defect become evident. As a result, unwitting
11 consumers are forced to repeatedly pay for ineffective “repairs.”

12 45. Had Sears disclosed the Defect, Plaintiffs would not have purchased the
13 Class Water Heaters or would have paid significantly less for them. Plaintiffs were
14 denied information about the Defect that was material to their purchasing decisions
15 and willingness to use their Class Water Heaters.
16

17 46. Plaintiffs and Class Members experienced damages from the Defect
18 within the warranty period on their Class Water Heaters. Plaintiffs and Class
19 Members reasonably expected that any and all damage resulting from the Defect
20 would be covered under Sears' warranties and that they would not be charged for
21 such repairs.
22

23 47. Sears systematically denies warranty coverage with respect to the
24 Defect. As a result of Sears' inaction and silence, consumers are unaware that they
25 purchased or leased Class Water Heaters that had the Defect at the point of sale. In
26 addition, consumers who experience a manifestation of the Defect and seek repairs
27
28

1 are not told that the “repairs” they pay for are ineffective and will have to be
2 repeated.

3 48. Due to the Defect, the values of the Class Water Heaters at the time of
4 purchase or lease were less than the amounts Plaintiffs and Class Members paid.

5 49. The Defect causes the Class Water Heaters to lose value, including
6 reducing re-sale value.

7 50. The Defect causes Class Members to incur repair costs, lose use and
8 enjoyment of their Class Water Heaters, and to suffer a loss of time and suffering
9 the burden of arranging and obtaining repairs.

11 **PROPOSED CLASS**

12 51. Plaintiffs bring this case as a class action under Fed. R. Civ. P. 23(b)(2)
13 and/or 23(b)(3) on behalf of the following Class:

14 *All persons in the state of California who purchased a Kenmore*
15 *water heater manufactured from 2010 to 2012 containing a*
16 *Honeywell Gas Valve.*

17
18 **CLASS CERTIFICATION ALLEGATIONS**

19 52. Numerosity. The Class is comprised of hundreds of Class Water Heater
20 owners within California, making joinder difficult if not impossible.

21 53. Commonality. Questions of law and fact exist that are common to all
22 Class Members, and predominate over any questions that affect only individual
23 Class Members, including (among others):

- 24
25 a. Whether Class Water Heaters suffer from the Defect;
26
27 b. Whether the Defect causes damage to the Class Water Heaters;

1 c. Whether the Defect existed at the time the Class Water Heaters
2 entered the stream of commerce;

3 d. Whether Sears knew or should have known about the Defect;

4 e. Whether Sears failed to disclose Defect at the time that Class
5 Members purchased the Class Water Heaters or thereafter;

6 f. Whether Sears breached its express warranties by failing to
7 permanently repair or refusing to repair the Defect for Class Members;
8

9 g. Whether Sears' failure to disclose the Defect constitutes an
10 unfair and deceptive act or practice in violation of the California Consumer
11 Legal Remedies Act and Unfair Competition Law.;
12

13 h. Whether Sears acted or refused to act on grounds generally
14 applicable to the Class, thereby making the award of equitable relief
15 appropriate to the Class as a whole;
16

17 i. Whether the Defect diminishes the value of the Class Water
18 Heaters.
19

20 54. Typicality. Plaintiffs' claims are typical of the claims of Class
21 Members.
22

23 55. Adequacy. Plaintiffs are adequate representatives of the proposed
24 classes because their interests do not conflict with the interests of the members of
25 the classes they seek to represent. Plaintiffs retained counsel who are competent and
26

1 experienced in complex class action litigation, and will prosecute vigorously on
2 Class Members' behalf.

3 56. Superiority. A class action is superior to other available means for the
4 fair and efficient adjudication of this dispute. The injury suffered by each Class
5 Member, while meaningful on an individual basis, is not of such magnitude as to
6 make the prosecution of individual actions against Sears economically feasible.
7 Even if Class Members themselves could afford individualized litigation, the court
8 system could not. In addition to the burden and expense of managing many actions
9 arising from the Defect, individualized litigation increases the delay and expense to
10 all parties and the court system presented by the legal and factual issues of the case.
11 By contrast, a class action presents far fewer management difficulties and provides
12 the benefits of single adjudication, economy of scale, and comprehensive
13 supervision by a single court.
14

15 57. In the alternative, the proposed Class(es) may be certified because:
16

17 a. the prosecution of separate actions by the individual members of
18 the proposed classes would create a risk of inconsistent adjudications, which
19 could establish incompatible standards of conduct for Sears;
20

21 b. the prosecution of individual actions could result in adjudications
22 that, as a practical matter, would be dispositive of the interests of non-party
23 Class Members, or which would substantially impair their ability to protect
24 their interests; and
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28

1 c. Sears acted or refused to act on grounds generally applicable to
2 the proposed classes, thereby making appropriate final and injunctive relief
3 with respect to members of the proposed classes as a whole.
4

5 58. Predominance. This class action is appropriate for certification because
6 questions of law and fact common to Class Members predominate over questions
7 affecting only individual members.
8

9 **TOLLING OF STATUTE OF LIMITATIONS**

10 59. Active Concealment Tolling. Any statutes of limitations are tolled by
11 Sears' knowing and active omission and concealment that the Class Water Heaters
12 suffered from a Defect. Sears had a duty to disclose this Defect and its consequent
13 performance and safety problems to Plaintiffs and Class Members because Sears had
14 superior knowledge of this Defect and the Defect was neither known to, nor easily
15 discoverable by, Plaintiffs and Class Members.
16

17 60. Despite its affirmative duty to disclose the nature and existence of this
18 Defect, Sears kept Plaintiffs and Class Members ignorant of vital information
19 essential to the pursuit of their claims, without any fault or lack of diligence on the
20 part of Plaintiffs or Class Members. The details of Sears' efforts to omit its above-
21 described unlawful conduct are in its possession, custody, and control, to the
22 exclusion of Plaintiffs and the Class Members. Plaintiffs could not reasonably have
23 discovered the fact that the Class Water Heaters suffered from a Defect.
24

25 61. Estoppel. Sears was and is under a continuing duty to disclose to
26 Plaintiffs and Class Members the true character, quality, and nature of the Defect.
27

1 At all relevant times, and continuing to this day, Sears knowingly, affirmatively, and
2 actively misrepresented and omitted the true character, quality, and nature of the
3 problems caused by this Defect. The details of Sears' knowledge and omissions are
4 in its possession, custody, and control, to the exclusion of Plaintiffs and Class
5 Members. Plaintiffs and Class Members reasonably relied upon Sears' knowing
6 and/or omissions. Based on the foregoing, Sears is estopped from relying upon any
7 statutes of limitation in defense of this action.
8

9 62. Equitable Tolling. Sears took active steps to omit the fact that it
10 wrongfully, improperly, illegally, and repeatedly manufactured, marketed,
11 distributed, sold, and/or leased the Class Water Heaters with the leaking problems
12 caused by the Defect. The details of Sears' efforts to conceal the Defect are in its
13 possession, custody, and control, to the exclusion of Plaintiffs and Class Members.
14 Sears' failure to disclose and active concealment of the Defect amounts to bad faith
15 and deception in and of itself. When Plaintiffs learned about this material
16 information, they exercised due diligence by thoroughly investigating the situation,
17 retaining counsel, and pursuing their claims. Should it be necessary, therefore, all
18 applicable statutes of limitation are tolled under the doctrine of equitable tolling.
19

20 63. Given Sears' active and knowing concealment of the Defect, equitable
21 tolling of the statutes of limitations applicable to the causes of action brought in this
22 case is appropriate.
23

24 64. Plaintiffs and Class Members could not have reasonably discovered the
25 true reasons for the Defect until the recent investigation which led to the filing of
26 this Complaint.
27

FIRST CLAIM FOR RELIEF
Breach of Express Warranty
Cal. U.C.C. § 2313

65. Plaintiffs, individually and on behalf of the Class, incorporate all of the foregoing allegations into this cause of action.

66. Sears expressly warranted that Class Water Heaters were free from defects in materials and workmanship and promised it would cover and/or replace all defective parts and provide replacement units for those that developed water leaks.

67. Sears materially breached its express warranties by manufacturing, selling, and leasing Class Water Heaters that contained the Defect, which rendered them unsafe or unfit for use as warranted.

68. Sears was put on notice of the breach by Plaintiffs' efforts to get their Class Water Heaters repaired by contacting Sears.

69. As a result of Sears' breach of warranties, Plaintiffs and Class Members have sustained damages, including diminished value of their Class Water Heaters.

70. Sears' time limits on its warranties are unconscionable because Sears knew or had reason to know that Plaintiffs and Class Members might not experience the deterioration of the Gas Valves in the Class Water Heaters and, in many instances, detection of the Defect would only occur once the Water Heaters leaked and stopped working properly after the warranty period had expired. By making misleading representations and/omissions about the Defect, Sears prevented Class Members from timely exercising their rights under the warranties.

1 71. Plaintiffs and Class Members are entitled to recover all damages as a
2 result of SEARS' breach of warranties in an amount in excess of \$5,000,000.00.

3 **SECOND CLAIM FOR RELIEF**
4 **Violation of the CLRA**
5 **Cal. Civ. Code § 1770 *et seq.***

6 72. Plaintiff re-alleges and incorporates each and every allegation set forth
7 above as if fully written herein.

8 73. Defendants fall within the definition of "person" as defined by the
9 CLRA. Cal. Civ. Code Sec. 1761(c).

10 74. Plaintiff and Class Members are "consumers" within the meaning of
11 the CLRA, as defined by Cal. Civ. Code Sec. 1761(d), who purchased one or more
12 pieces of Class Water Heaters.
13

14 75. The CLRA prohibits "unfair or deceptive acts or practices undertaken
15 by any person in a transaction intended to result or which results in the sale or lease
16 of goods or services to any consumer[.]" Cal. Civ. Code Sec. 1770(a).
17

18 76. Sears has engaged in unfair or deceptive trade practices that violated
19 Cal Civ. Code Sec. 1770(a), as described above and below, by, among other things,
20 failing to disclose the defective nature of Class Water Heaters, representing that
21 Class Water Heaters were of a particular standard, quality, or grade when they were
22 of another, and advertising Class Water Heaters with the intent not to sell them as
23 advertised. *See* Cal. Civ. Code Sections 1770(a)(5), (a)(7), (a)(9).
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1 77. Sears knew, should have known, or was reckless in not knowing that
2 its products did not have the qualities, characteristics, and functions it represented,
3 warranted, and advertised them to have.

4 78. Plaintiff and Class Members are reasonable consumers who expected
5 that their Class Water Heaters would work as represented.

6 79. As a result of Sears' conduct and unfair or deceptive acts or practices,
7 Plaintiff and Class Members suffered actual damages in that the Class Water Heaters
8 do not function as represented and are not worth the amount paid and Sears has
9 deprived Plaintiff and Class Members the benefit of the bargain.

10 80. Plaintiff and the Class seek an order enjoining Sears' unfair or
11 deceptive acts or practices, equitable relief, an award of attorneys' fees and costs
12 under Cal. Civ. Code Sec. 1780(e).

13 81. Pursuant to the Provisions of the CLRA, Plaintiff will give notice of the
14 defect to Sears and upon the expiration for the period described in Cal. Civ. Code
15 Section 1782, subd. (d), Plaintiffs will amend this Complaint to state a claim for
16 damages under the CLRA.

17 **THIRD CLAIM FOR RELIEF**
18 **Violation of the UCL**
19 **Cal. Bus. & Prof. Code § 17200 *et seq.***
20

21 82. Plaintiff re-alleges and incorporates each and every allegation set forth
22 above as if fully written herein.
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1 83. California Business & Professions Code § 17200 prohibits acts of
2 “unfair competition,” including any “unlawful, unfair or fraudulent business act or
3 practice” and “unfair, deceptive, untrue or misleading advertising.” Sears’ conduct
4 related to the sale of its defective Class Water Heaters violated each of this statute’s
5 three prongs.
6

7 84. Sears committed an unlawful business act or practice in violation of
8 Cal. Bus. & Prof. Code § 17200, et seq., by their violations of the Consumers Legal
9 Remedies Act, Cal. Civ. Code § 1750, et seq., as set forth above, by the acts and
10 practices set forth in this Complaint.
11

12 85. Sears committed unfair business acts and practices in violation of Cal.
13 Bus. & Prof. Code § 17200, et seq., when it sold Class Water Heaters that contained
14 the Defect, and when it represented that the Class Water Heaters were in good
15 working order and functioned as intended at the point of sale when in fact they did
16 not.
17

18 86. Sears committed fraudulent business acts and practices in violation of
19 Cal. Bus. & Prof. Code § 17200, et seq., when it affirmatively and knowingly
20 misrepresented that the Class Water Heaters were suitable for installation in the
21 home and free from any defects. Sears’ representations and concealment of the
22 defect are likely to mislead the public with regard to the true defective nature of the
23 Class Water Heaters.
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1 87. As a direct and proximate result of Sears' unfair and deceptive
2 practices, Plaintiff and Class Members suffered and will continue to suffer actual
3 damages.

4 88. As a result of its unfair and deceptive conduct, Sears has been unjustly
5 enriched and should be required to disgorge its unjust profits and make restitution to
6 Plaintiff and Class Members pursuant to Cal. Bus. & Prof. Code §§ 17203 and
7 17204.
8

9 89. Legal remedy alone will be insufficient to fully redress Plaintiff's
10 injuries and stop Sears from continuing in its unfair and deceptive conduct.
11 Therefore, Plaintiff and the Class seek equitable relief, including an order enjoining
12 Sears' unfair or deceptive acts or practices, and an award of attorneys' fees and costs
13 under Cal. Code of Civ. Proc. § 1021.5.
14
15

16
17 **FOURTH CLAIM FOR RELIEF**
18 **Breach of Implied Warranty**
19 **Cal. Civ. Code § 1791.1**

20 90. Plaintiffs, individually and on behalf of the Class, incorporate all of the
21 foregoing allegations into this cause of action.

22 91. Sears warrantied that Class Water Heaters were of merchantable quality
23 and fit for their ordinary purpose. Sears warrantied that the Class Water Heaters'
24 primary components, including the Gas Valves, would operate properly. Sears
25 breached these implied warranties in that the Class Water Heaters were not
26 merchantable because parts of the Gas Valves deteriorate, causing Class Water
27

1 Heaters to develop holes and leak water. The Class Water Heaters' Gas Valves
2 contained the Defect described herein, such that the water heaters leaked and failed
3 to function as intended.

4 92. To the extent necessary, Plaintiffs and each Class Member have had
5 sufficient direct dealings with Sears or its agents (including dealerships) to establish
6 privity of contract between Sears, on the one hand, and Plaintiffs and each member
7 of the Class, on the other hand. Nonetheless, privity is not required here because
8 Plaintiffs and each Class Member are intended third-party beneficiaries of contracts
9 between Sears and dealers of its Kenmore appliances, and specifically, of Sears'
10 implied warranties. These dealers were not intended to be the ultimate consumers of
11 the Class Water Heaters and have no rights under the warranty agreements provided
12 with the Class Water Heaters; the warranty agreements were designed for and
13 intended to benefit consumers only.
14

15
16 93. As a result of Sears' breaches of implied warranties, Plaintiffs and Class
17 Members have suffered damages.
18

19 **FIFTH CLAIM FOR RELIEF**

20 **Negligence**

21 94. Plaintiffs, on behalf of the Class, incorporate all of the foregoing
22 allegations into this cause of action.
23

24 95. Sears owed Class Members a duty of reasonable care to ensure that the
25 Gas Valves within the Class Water Heaters would operate safely and properly for
26 their reasonably anticipated use.
27

1 96. Sears breached its duty by failing to ensure that the Gas Valves used in
2 Class Water Heaters were free from the Defect. Sears also breached its duty by
3 failing to warn Plaintiffs and Class Members that the Gas Valves used in Class Water
4 Heaters were not free from the Defect or the safety hazards caused by it.

5 97. As a direct and proximate result of Sears' negligence, holes develop in
6 the water heaters, causing them to leak and causing Plaintiffs to have to seek
7 replacement parts or replacement water heaters. As a result, Plaintiffs and Class
8 Members have suffered damages.
9

10 **SIXTH CLAIM FOR RELIEF**
11 **Violation of the Magnuson-Moss Warranty Act**
12 **15 U.S.C. § 2301, *et seq.***

13 98. Plaintiffs, individually and on behalf of the Class, incorporate all of the
14 foregoing allegations into this cause of action.

15 99. Under the Magnuson-Moss Warranty Act (the "Act"), Class Members
16 are "consumers," Sears is a "supplier" and "warrantor," and the Class Water Heaters
17 are "consumer products."

18 100. Under 15 U.S.C. § 2301(d)(1), the Act provides a cause of action for
19 any consumer who is damaged by the failure of a warrantor to comply with a written
20 or implied warranty.
21

22 101. Sears' express warranties are written warranties within the meaning of
23 the Act, 15 U.S.C. § 2301(6). The Class Water Heaters' implied warranties are
24 covered under 15 U.S.C. § 2301(7).
25

26 102. Sears breached these warranties as described in more detail above in
27 the First Cause of Action. Without limitation, all Class Water Heaters suffer from a
28

1 common Defect that manifests in the form of water leaks and the Defect is present
2 at the point of sale.

3 103. Under the Act, Sears was obligated to disclose to Class Members the
4 known Defect and was obligated to repair or otherwise remedy the Defect.

5 104. To the extent necessary, Plaintiffs and each Class Member have had
6 sufficient direct dealings with Sears or its agents to establish privity of contract
7 between Sears, on the one hand, and Plaintiffs and each Class Member, on the other
8 hand. Nonetheless, privity is not required here because Plaintiffs and each member
9 of the Class are intended third-party beneficiaries of contracts between Sears and its
10 retailers and subsidiaries, and specifically, of Sears' express and/or implied
11 warranties. These retailers were not intended to be the ultimate consumers of the
12 Class Water Heaters and have no rights under the warranty agreements provided
13 with the Class Water Heaters; the warranty agreements were designed for and
14 intended to benefit consumers only.
15
16

17 105. Sears failed to meet its disclosure and remedy obligations, despite
18 reasonable opportunity to do so.

19 106. Sears' violation of the Act caused damage to Class Members and
20 entitles them to statutory relief.
21

22 **SEVENTH CLAIM FOR RELIEF**
23 **Unjust Enrichment**

24 107. Plaintiffs, on behalf of the Class, incorporate all of the foregoing
25 allegations into this cause of action.
26
27
28

1 108. As described above, Sears sold Class Water Heaters to Class Members
2 even though the Gas Valves were defective and imposed a safety hazard, and failed
3 to disclose its knowledge of the Defect and its attendant risks at the point of sale or
4 otherwise. Furthermore, Sears charges for repairs of the water heaters without
5 disclosing that the Defect is widespread and that the repairs do not address its root
6 cause.

7
8 109. As a result of its fraudulent acts and omissions related to the defective
9 water heaters, Sears obtained monies which rightfully belong to Plaintiffs and Class
10 Members to their detriment.

11 110. Sears appreciated, accepted, and retained the non-gratuitous benefits
12 conferred by Plaintiffs and Class Members, who, without knowledge of the Defect,
13 paid a higher price for their water heaters than those water heaters were worth. Sears
14 also received monies for the water heaters that Plaintiffs and Class Members would
15 not have otherwise paid for the Class Water Heaters had they been aware of the
16 Defect.

17
18 111. Sears' retention of these wrongfully-obtained profits violates
19 fundamental principles of justice, equity, and good conscience.

20 112. Plaintiffs and Class Members are entitled to restitution of the profits
21 Sears unjustly obtained, plus interest.
22

23 **PRAYER FOR RELIEF**

24 Therefore, Plaintiffs seek judgment against Sears and relief as follows:

25 A. An Order certifying this case as a Class Action;
26
27

- 1 B. An Order appointing the Plaintiffs as the Class Representatives of the
2 Class;
3 C. An Order appointing Plaintiffs' counsel as Class Counsel;
4
5 D. Damages and other relief under statutory or common law;
6 E. Attorneys' fees and costs;
7 F. Pre- and post-judgment interest;
8
9 G. Declaratory, injunctive, and equitable relief; and
10 H. Such other relief as is just and proper.
11
12
13

14 **JURY DEMAND**

15 Plaintiffs, on behalf of themselves and the proposed Class, hereby demand a
16 trial by jury as to all matters so triable.
17

18
19 DATED: July 11, 2018

Respectfully submitted,

20 /s/ Crystal Foley

21 Crystal Foley (SBN 224627)

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